Gek Sing a/l Kaliappan v Public Prosecutor

HIGH COURT (KANGAR) — CRIMINAL APPEAL NO 41–5–1999
VINCENT NG J
22 SEPTEMBER 1999

Criminal Procedure — *Sentence — Adequacy of sentence — Deterence — Illegal possession of protected species of snakes — Whether imprisonment appropriate — Whether proper for court to invoke s 325 of Criminal Procedure Code to enhance term of imprisonment of seven days to 14 days*

The appellant had pleaded guilty to three charges of illegal possession of certain protected species of snakes under the Protection of Wild Life Act 1972. He was sentenced by the magistrates' court to seven days imprisonment and RM3,000 fine, and in default three months jail for the first and second charges, and on the third charge, seven days imprisonment and RM5,000 fine, and in default five months jail. He appealed against the sentences. Counsel submitted that as the accused was a first offender, the learned magistrate ought not have imposed a term of imprisonment.

Held, dismissing the appeal and increasing the respective seven days period of imprisonment to 14 days on each of the three charges:

(1) Bearing in mind the unusually short recurrence span of like offences, and the prevalence in Perlis of illegal possession of huge quantity of snakes (obviously for smuggling purposes) and in order to deter such offences, the learned magistrate had, quite rightly and wholly acting within his powers, found it necessary to impose a short term of imprisonment apart from the maximum fine he had normally imposed in the previous cases (see p 650A–C). Thus, the court is entirely satisfied that the sentence of the fine coupled with imprisonment imposed by the learned magistrate was not manifestly excessive under the circumstances of the case and he had adequately taken into consideration all the relevant factors necessary to maintain an equitable balance between prosecution and the offender (see p 651B–C).

(2) After having heard counsel, as a forewarning to characters of the appellant's ilk, this was a proper case to invoke s 325 of the Criminal Procedure Code to enhance the term of imprisonment of seven days to 14 days on each of the three charges, all to be served by the appellant concurrently (see p 651D–E).

[Bahasa Malaysia summary

Perayu telah membuat pengakuan bersalah kepada tiga pertuduhan memiliki secara tidak sah spesis ular tertentu yang diperlindungi di

bawah Akta Perlindungan Hidupan Liar 1972. Beliau telah djatuhkan hukuman tujuh hari penjara dan denda sebanyak RM3,000 oleh mahkamah sesyen dan jika ingkar tiga bulan penjara bagi pertuduhan pertama dan kedua, dan bagi pertuduhan ketiga, tujuh hari penjara dan denda sebanyak RM5,000, dan jika ingkar lima bulan penjara. Beliau membuat rayuan terhadap hukuman-hukuman tersebut. Peguam menghujahkan bahawa memandangkan tertuduh merupakan pesalah kali pertama, majistret yang bijaksana seharusnya tidak mengenakan satu tempoh penjara.

Diputuskan, menolak rayuan tersebut dan memanjangkan tempoh tujuh hari penjara tersebut kepada 14 hari bagi setiap tiga pertuduhan tersebut:

(1) Dengan mengambil kira tempoh pendek berulangnya kesalahan-kesalahan yang sama, dan dengan tersebar luasnya di Perlis pemilikan tidak sah sejumlah besar ular-ular (jelas untuk tujuan penyeludupan) dan bagi tujuan mencegah kesalahan-kesalahan sebegini, majistret yang bijaksana telah, benar-benar betul dan sama sekali telah bertindak di dalam kuasa beliau, mendapati adalah perlu untuk mengenakan tempoh penjara yang singkat selain daripada denda maksima yang beliau biasanya kenakan di dalam kes-kes terdahulu (lihat ms 650A–C). Oleh itu, mahkamah telah berpuas hati pada keseluruhannya bahawa hukuman denda ditambah lagi dengan pemenjaraan yang dikenakan oleh majistret yang bijaksana tidaklah dengan jelas melampau di bawah keadaan-keadaan kes tersebut dan beliau telah dengan secukupnya mengambil kira kesemua faktor-faktor berkaitan yang perlu untuk mengekalkan keseimbangan yang adil antara pihak pendakwaan dan tertuduh (lihat ms 651B–C).

(2) Setelah mendengar peguam, sebagai satu amaran awal kepada sesiapa yang mempunyai tabiat yang sama seperti perayu , ini merupakan kes yang wajar untuk membangkitkan s 325 Kanun Prosedur Jenayah bagi menambahkan tempoh pemenjaraan tujuh hari kepada 14 hari bagi setiap tiga pertuduhan itu, kesemuanya dijalankan serentak oleh perayu (lihat ms 651D–E).]

Notes

For cases on adequacy of sentence generally, see 5 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 2477–2501.

Cases referred to

Abu Seman v PP [1982] 2 MLJ 338 (refd)
Chan Sit Hoong v PP [1975] 1 MLJ 261 (refd)
Chunbidya & Ors v Emperor AIR 1935 PC 35 (refd)
Goh Kheng Seong v PP [1993] 1 MLJ 103 (refd)

A *Haji Johari bin Haji Abdul Karim v PP* [1989] 2 MLJ 276 (refd)
Hari Ram Seghal v PP [1981] 1 MLJ 165 (refd)
Hashim bin Pawanchee & Anor v PP [1988] 2 MLJ 66 (refd)
Jaafar bin Abu & Anor v PP [1988] 2 MLJ 363 (refd)
Joginder Singh v PP [1984] 2 MLJ 133 (refd)
B *Lasoo & Anor v PP* [1965] 1 MLJ 235 (refd)
Lee Chow Meng v PP [1976] 1 MLJ 287
Lee Yong Wu v PP [1962] MLJ 351 (refd)
Leong Ka Kong v PP [1976] 2 MLJ 21 (refd)
Lim Yoon Fah v PP [1971] 1 MLJ 37 (refd)
Loh Hock Seng & Anor v PP [1980] 2 MLJ 13 (refd)
C *Marimuthu Balakrishnan v PP* [1974] 2 MLJ 145 (refd)
Mohd Abdullah Ang Swee Kang v PP [1988] 1 MLJ 167 (refd)
Mohd Johan Mutalib v PP [1978] 1 MLJ 213 (refd)
PP v Chan Chuan & Anor [1991] 2 MLJ 538 (refd)
PP v Chot Saik Kam [1991] 1 MLJ 193 (refd)
D *PP v Jafa bin Daud* [1981] 1 MLJ 315 (refd)
PP v Low Kok Wai [1988] 2 CLJ 105 (refd)
PP v Ng Chong Wan [1988] 3 MLJ 114 (refd)
PP v Oo Leng Swee & Ors [1981] 1 MLJ 247 (refd)
PP v Ravindran & Ors [1993] 1 MLJ 45
PP v Saad bin Mat Takraw & Anor [1998] 3 MLJ 784 (refd)
E *PP v Teo Heng Chye* [1989] 3 MLJ 205 (refd)
PP v Wong Kok Sien [1988] 2 MLJ 436 (refd)
PP v Yap Chong Fatt [1963] MLJ 136 (refd)
PP v Yap Huat Heng [1985] 2 MLJ 414 (refd)
PP v Zulkifli Omar [1998] 6 MLJ 65 (refd)
F *R v Ball* 35 Cr App R 164 (refd)
R v Boyd 193 Cr LR 613 (refd)
R v Cutbush (1867) LR 2 QB 329 (refd)
R v John Alistair Faulkner (1972) 56 Cr App R 594, 1972 Crim LR 57 (refd)
G *R v Ladd & Tristam* (1975) Cr LR 50 (refd)
R v Meade (1982) 4 Cr App R (S), 193 Cr LR 613 (refd)
R v Newton (1982) 4 Cr App R 388 (refd)
Raja Izzuddin Shah v PP [1979] 1 MLJ 270 (refd)
Sau Soo Kim v PP [1975] 2 MLJ 134 (refd)
Taib bin Gemok v PP [1984] 1 MLJ 313 (refd)
H *Wong Kai Chuen Phillip v PP* [1991] 1 MLJ 321 (refd)
Yong Pak Yong v PP [1959] MLJ 176 (refd)
Zaidon Shariff v PP [1996] 4 CLJ 441 (refd)

Legislation referred to

I Courts of Judicature Act 1964 s 31
Criminal Procedure Code ss 283(i)(c)(2), 323, 325(ii)
Protection of Wild Life Act 1972 s 68

Abdul Razak bin Musa (*Deputy Public Prosecutor*) for the prosecution. A
S Devandran (*Devandran & Co*) for the appellant.

Vincent Ng J: On 19 April 1999, the learned magistrate convicted the appellant after he pleaded guilty to the following three charges under the Protection of Wild Life Act 1972 to wit:

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(1) Bahawa kamu pada 12 April 1999, jam lebih kurang 3.15 petang, di Setor Kastam Padang Besar, Padang Besar Utara dalam Negeri Perlis, didapati bersalah dengan menyalahi undang-undang memiliki 105 ekor 'binatang liar yang diperlindungi' iaitu 105 ekor Ular Asiatic Cobra (Naja-naja) yang masih hidup (sejenis binatang liar yang disenaraikan dalam Jadual Dua, butiran 422 di bawah Akta C
Perlindungan Hidupan Liar 1972). Oleh hal yang demikian, kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah s 68, Akta Perlindungan Hidupan Liar (Pindaan) 1988, Akta Perlindungan Hidupan Liar bil 76 tahun 1972 ('the first charge').

(2) Bahawa kamu pada tarikh, waktu dan di tempat yang sama, telah D
didapati dengan menyalahi undang-undang memiliki 2,441 ekor 'binatang liar yang diperlindungi' iaitu 2,441 ekor ular Oriental Rat Snake (Ptyas mucosus) yang masih hidup (sejenis binatang liar yang disenaraikan dalam Jadual Dua, butiran 433, di bawah Akta Perlindungan Hidupan Liar 1972). Oleh hal yang demikian, kamu telah melakukan kesalahan yang boleh dihukum di bawah s 68, Akta E
Perlindungan Hidupan Liar (Pindaan) 1988, Akta Perlindungan Hidupan Liar bil 76 tahun 1972 ('the second charge').

(3) Bahawa kamu pada tarikh, waktu dan di tempat yang sama, telah didapati dengan menyalahi undang-undang memiliki 2,546 ekor 'binatang liar yang diperlindungi' iaitu 105 ekor Ular Asiatic cobra (Naja-naja) dan 2,441 ekor Ular Oriental Rat Snake (ptyas mucosus) F
dalam kurungan yang tidak sesuai (dengan mengurung binatang berkenaan dalam karung guni net nylon dan raga plastik) (sejenis binatang liar yang disenaraikan dalam Jadual Dua, butiran 422 dan 433, di bawah Akta Perlindungan Hidupan Liar 1972. Oleh hal yang demikian, kamu telah melakukan kesalahan yang boleh dihukum di G
bawah s 92(1)(c) (Pindaan) 1988, Akta Perlindungan Hidupan Liar bil 76 tahun 1972. ('the third charge').

On the first charge, the appellant was sentenced to seven days imprisonment and RM3,000 fine, and in default three months jail. He was similarly penalized on the second charge, and on the third charge the H
learned magistrate imposed seven days imprisonment and RM5,000 fine, and in default five months jail.

Some like it hot in the pot, but most hate it — in or out of the pot — since its alleged unfortunate watershed encounter with the biblical Adam and Eve. Be that as it may, like it or not, the snakes concerned in the current charges against the appellant are protected species not only in Malaysia but, I
also, under the Convention on the Trade of Endangered Species of Flora and Fauna of which Malaysia became a member since 19 October 1977.

Sentencing is guided by established principles and guidelines — in accordance with which, the courts generally exercise their discretion — which I would now propose to adumbrate in catalogue form for the benefit of judicial officers of the lower courts, who have scarce time to glean and pick the essential points from a long rambling dissertation on the topic. The principles and guidelines to be adopted, though not slavishly applied in every case, are, to wit:

(1) Public interest is of paramount consideration, though, if the offender could, by the nature of the sentence, be induced to turn from criminal ways to honest living, such interest is indeed served. See *R v Ball* 35 Cr App R 164, *Lim Yoon Fah v PP* [1971] 1 MLJ 37, *Chan Sit Hoong v PP* [1975] 1 MLJ 261 and *Goh Kheng Seong v PP* [1993] 1 MLJ 103.

(2) A first offender of good character where his first offence is not of great intrinsic gravity ought not to be sent to prison — see *PP v Yap Chong Fatt* [1963] MLJ 136, *Taib bin Gemok v PP* [1984] 1 MLJ 313 and *Zaidon Shariff v PP* [1996] 4 CLJ 441.

(3) A previous conviction is to be taken into consideration in assessing sentence only if the previous offence was not too far apart in time and was of a similar nature as the one with which an accused is presently charged, and the court may call for evidence of information regarding the background, antecedent and character of the accused. See *PP v Jafa bin Daud* [1981] 1 MLJ 315. The telling effect of a previous conviction on an offence committed a considerable time before, though of a similar nature to the current charge, ought to be viewed as having attenuated.

(4) A plea of guilt especially before the trial has commenced should be treated as a mitigating factor and, it is generally accepted that the extent of the reduction on account of a plea of guilty to a charge would be between one-quarter and one-third of what otherwise would have been the sentence. And, such credit or discount to be given in favour of the accused person is not on the maximum sentence imposed by law but rather on a sentence which would have been imposed if the accused had claimed trial and had been found guilty. See *Mohd Abdullah Ang Swee Kang v PP* [1988] 1 MLJ 167, *R v Meade* (1982) 4 Cr App R (S), *PP v Ravindran & Ors* [1993] 1 MLJ 45 and *R v Boyd* 193 Cr LR 613. See also *PP v Low Kok Wai* [1988] 2 CLJ 105 and *PP v Oo Leng Swee & Ors* [1981] 1 MLJ 247, *Sau Soo Kim v PP* [1975] 2 MLJ 134 (where it was also held that a guilty plea is not appealable save under certain circumstances).

(5) There is a clear dichotomy between pre and post-conviction stages of a trial and the charge per se does not form the basis for the sentence. It is from the facts put forward by the prosecution, including facts which aggravate the offence, as admitted or contested by the accused, that form such basis for sentencing. And, should the version of facts admitted by the accused and the prosecution's version differ but differ not so markedly or significantly or so materially as to affect the

substratum ingredients of the charge and negate the very plea of guilt, a 'newton hearing' ought to be carried out in the interest of justice. See *Goh Kheng Seong v PP* [1993] 1 MLJ 103 and *R v Newton* (1982) 4 Cr App R 388.

(6) The other basis to be considered in determining what the proper level of sentence should be is the mitigation plea which should not be brushed aside but examined and considered equally with the facts presented by the prosecution to strike a true balance in the scale of justice. See *Raja Izzuddin Shah v PP* [1979] 1 MLJ 270. The aggravating factors should be considered in conjunction with the mitigating factors including matters of mitigation special to the accused himself.

(7) In determining the length of custodial sentence: 'the court must look at the overall picture in perspective by considering, firstly, the gravity of the type of offence committed; secondly, the facts in the commission of the offence; thirdly, the presence or absence of mitigating factors, and fourthly, the sentences that have been imposed in the past for similar offences to determine the trend of sentencing policy, if any. The fact that a sentence of imprisonment is imposed as a deterrence does not justify the sentencer in passing a sentence of greater length than what the facts of the offence warrant. The gravity of the type of offence involved must be considered in the light of the particular facts of the offence': per Mohd Azmi SCJ in *Mohamed Abdullah Ang Swee Kang v PP*, wherein the following dicta of James LJ in *R v Ladd & Tristam* (1975) Cr LR 50, was cited with approval at p 170:

> We have to look at the overall picture of what is the right sentence for the total involvement, the total degree of criminality involved, and we had to keep the sentences in perspective with the sentences that have been passed on other occasions for offences involving criminal activity of this kind though of course varying in their gravity. Clearly, a deterrent element has to be involved, but because the offences are very serious, it does not necessarily follow that on the particular facts, very long sentences are justified.

Also, I subscribe totally to the salutary advice appearing in the obiter dictum of Wan Yahya J in *Hari Ram Seghal v PP* [1981] 1 MLJ 165, who had this to say: 'The court must resist the temptation and decline any invitation into playing the romantic role of the avenger and must concentrate itself instead on procuring justice and upholding the rule of law through our recognized machinery of justice. The persons appearing in our courts have the right to expect the best quality of justice and nothing less. Any mistake or flaw in the machinery, which may have the possibility of injustice, must be resolved in their favour.' Yet, I would agree that in appropriate cases 'judges should not develop a phobia against inflicting the death penalty': *Loh Hock Seng & Anor v PP* [1980] 2 MLJ 13.

(8) The sentencer is clothed with unencumbered discretion — safe by express law — in deciding the appropriate sentence to mete out,

A though such discretion ought to be exercised in accordance with certain established principles.

(9) In the exercise of such discretionary function in sentencing (as opposed to and distinct from a finding of guilt or innocence which is not a matter of discretion), the sentencer may take judicial notice of
B the prevalence of similar offences and other related factors. See *Lee Chow Meng v PP* [1976] 1 MLJ 287, *Yong Pak Yong v PP* [1959] MLJ 176, *PP v Zulkifli Omar* [1998] 6 MLJ 65 to be read with *PP v Saad bin Mat Takraw & Anor* [1998] 3 MLJ 784. Judicial notice may be taken on matters of common and general knowledge. What matters constitute common or general knowledge may be gathered from
C *Sarkar on Evidence* (12th Ed) where the learned author, speaking of common knowledge, at p 575, said: 'The matter of which a court will take judicial notice must be a subject of common and general knowledge. In other words, judicial knowledge of the facts is measured by general knowledge of the same facts. A fact is said to be generally recognized or known when its existence or operation is
D accepted by the public without qualification or contention. The test is whether sufficient notoriety attaches to the fact involved as to make it proper to assume its existence without proof.

(10) The determination whether a concurrent or consecutive sentence ought to be imposed, in respect of several offences tried together is
E dependant on the particular facts of each case. See *Lee Chow Meng v PP* [1976] 1 MLJ 287. And, where two or more clearly distinct and separate offences on different persons, had been committed, sentences of imprisonment should not be made to run concurrently. See *R v Cutbush* (1867) LR 2 QB 329. It should only be made concurrent when an offender had been convicted of a principal and a
F subsidiary offence or an offence closely related to the principal offence or arising out of the same transaction. See *PP v Yap Huat Heng* [1985] 2 MLJ 414; *Abu Seman v PP* [1982] 2 MLJ 338, *Hashim bin Pawanchee & Anor v PP* [1988] 2 MLJ 66, *Haji Johari bin Haji Abdul Karim v PP* [1989] 2 MLJ 276, *PP v Wong Kok Sein & Ors* [1988] 2 MLJ 436, *Sau Soo Kim v PP* and *PP v Ng Chong Wan* [1988] 3 MLJ
G 114.

(11) The Penal Code and the Criminal Procedure Code give no direct guidance as to consecutive and concurrent sentences and our lower courts are often confronted with this perplexing question. However, should an accused be convicted of two or more offences tried together,
H the Singapore courts have adopted the totality test enunciated in *R v John Alistair Faulkner* (1972) 56 Cr App R 594, 1972 Crim LR 577. See *Marimuthu Balakrishnan v PP* [1974] 2 MLJ 145, *PP v Teo Heng Chye* [1989] 3 MLJ 205, *PP v Wong Kok Sien* [1988] 2 MLJ 436, *PP v Chot Saik Kam* [1991] 1 MLJ 193 and *Wong Kai Chuen Phillip v PP* [1991] 1 MLJ 321. It is an established principle of sentencing that
I where consecutive sentences are passed against an offender, a duty is imposed on the sentencer to take into account the totality of the cumulative sentences to determine whether it is justified by the

criminal behaviour of the offender, the degree of his culpability and the aggravating features of the crime in the cases as a whole. As analysed by DA Thomas in *Principles of Sentencing* (2nd Ed) at p 57, the totality principle has two limbs:

> 'A cumulative sentence may offend the totality principle if the aggregate sentence is substantially above the normal level of sentences for the most serious of the individual offences involved or if its effect is to impose on the offencer 'a crushing sentence' not in keeping with his record or prospects.'

It is to be noted that this totality approach was readily accepted here in *Hashim bin Pawanchee & Anor v PP* where Mohd Dzaiddin J (as he then was), following *Marimuthu Balakrishnan v PP* said at p 68: 'On the other hand, on the basis of the principles discussed above, in my judgment, the decision of the learned magistrate to order the sentence to run consecutively is not wrong in principle having regard to the offences and the totality of the sentences.' But, in that case, it was further held that since the six sentences (for misappropriation and forgery) ought to run consecutively, the 14 months' term of imprisonment for each offence was 'manisfestly excessive and, unreasonable' and his lordship reduced the 14 months term to 12 months term for each of the six charges. See also *Sau Soo Kim v PP.*

After having exercised his discretion to order the sentences to run consecutively, a further duty is reposed in the sentencer to show that he had acted judicially by giving reasons for so acting. A 'crushing sentence' is discouraged for the obvious reason that our penal system does not subscribe to the parole system such as practised in the United States of America, where the imposition of aggregate sentences of 30 to 80 years are not uncommon phenomenon. Though, in this context it may not be of interest to add here that, the sentences of caning for two or more distinct offences do not merge but instead are aggregated. See *PP v Chan Chuan & Anor* [1991] 2 MLJ 538.

(12) It is settled that the High Court in hearing an appeal may, and has complete jurisdiction, to proceed to exercise its powers of revision and make such orders as it deems fit under ss 323 and 325 of the Criminal Procedure Code and s 31 of the Courts of Judicature Act 1964 — provided that no order to the prejudice of the accused shall be made unless he or his counsel has had an opportunity of being heard (see s 325(ii) of CPC). See *Jaafar bin Abu & Anor v PP* [1988] 2 MLJ 363 and *Chunbidya & Ors v Emperor* AIR 1935 PC 35 at p 36.

(13) In an appeal on sentence from the subordinate courts, the High Court will not interfere with the sentence imposed, even should it be felt that a higher or lower sentence would be more appropriate, unless it can be shown to its satisfaction that in the circumstances of the particular case, the sentence was manifestly excessive or inadequate or that in fixing the sentence, the subordinate court had failed to adequately consider all relevant factors, either for or against the offender. See *Joginder Singh v PP* [1984] 2 MLJ 133; *Leong Ka Kong v PP* [1976] 2 MLJ 21 and *PP v Ng Chong Wan.*

(14) The question is often raised in the sentencer's mind as to the period of imprisonment to impose in the event that the accused makes default in payment of the fine ordered. In my view, such a period ought, within the confines expressly mandated in s 283(i)(c)(2) of the Criminal Procedure Code, to be co-extensive or at least reasonably co-relative with the income that the accused would have earned in his then current occupation had he not opted to remain in prison. And, should the accused be unemployed, then the amount payable in default may be whatever amount that is reasonable and not too onerous considering his qualifications or social status or standing in life. It is thus material for the sentencer to discover and make a record of the accused's income or his standing in life. See *Goh Keng Seong v PP* and *Mohd Johan Mutalib v PP* [1978] 1 MLJ 213.

The facts and circumstances of the case carefully gleaned from the appeal record and the submissions of counsel and the learned deputy public prosecutor throw into sharp focus the deterrent factor among the several considerations encompassed under principles of sentencing discussed above in the welter of case authorities. See *PP v Ng Chong Wan*.

What we have here is a case where, within the period of less than three months from 23 January 1999 to 12 April 1999, there were four separate but similar snake-cases in the magistrate's court calendar for offences committed at regular intervals, that is, on 23 January 1999, 2 February 1999, 8 February 1999 and 12 April 1999. In every single one of the offences, persons of various identities were accused of illegal possession of snakes had pleaded guilty, and quietly paid the fine of RM3,000 to RM4,000 for each offence. Notably, there was never any appeal against the maximum or near maximum fine. Immediately after the disposal of each case, the snake exhibits were then ordered to be sent to the Wild Life Protection Department. But, due to the inability of the said department to maintain the very large number of wild snakes they had to be promptly auctioned-off. And, the appeal record (pp 23 and 24) discloses that such public auctions of snakes have consistently found ready bidders among certain characters, though — I must hasten to add — not the accused persons. This peculiar sequence of arrest, conviction and bidding soon assume a sinister pattern to the alert magistrate.

It then dawned upon the learned magistrate who, incidentally, had presided over all the previous four similar snake-cases, that snakes of the species concerned fetch considerably higher prices in the overseas esoteric market of gourmet patrons than auction prices, and the courts may have been unwittingly used to regularise or legitimise the illegal possession for smuggling of protected snakes. To put it bluntly, there appeared to be a cunning conspiracy for monetary gain through cynical instrumentation of the court of law by certain parties. According to the learned magistrate, in his grounds of judgment (p 19 of the record), the 2,546 snakes could fetch an estimated RM80,000 in the esoteric market, which works out to an average of RM31.42 per snake. Whereas it appears from the receipts exhibits in p 24 of the appeal record, that certain bidders at the auction conducted by the Wild Life Protection Department paid only around RM4

per snake. Thus, even taking into consideration the total fines of RM11,000 paid in the current case, it does not call for any mathematical prowess to figure out that the net profit on 2,546 snakes could be not less than RM58,816. Such cool amount of illicit profit obviously attracts hot penalty. Hence, in the current case, bearing in mind the unusually short recurrence span, and the prevalence in Perlis of illegal possession of huge quantity of snakes (obviously for smuggling purposes) and in order to deter such offences, the learned magistrate Tuan Azizan Md Arshad had, quite rightly and wholly acting within his powers, found it necessary to take judicial notice of the considerably higher prices than auction prices that such snakes fetch in foreign esoteric market, and was driven to impose a short term of imprisonment besides the maximum fine he had normally imposed in the previous cases. He was convinced he had little choice, as the maximum fines he had imposed in earlier cases did not seem to have the slightest effect (see *Lee Yong Wu v PP* [1962] MLJ 351), and decided that a fine alone could never be a deterrent sentence in a case of this nature (see *Lasoo & Anor v PP* [1965] 1 MLJ 235). Quite apparently, that penalty of incarceration was the singular factor that may have thrown certain sinister operators out of their lucrative rhythm of operation, and hence this appeal. Incidentally, it is of interest to note that since the date of commission of this offence on 12 April 1999 until now, no such snake-offences have been recorded in Perlis, and all is quiet on the Northern Front — so to say.

In dispensing justice, magistrates should not be oblivious of the feel of temperature outside their courts and continue to adopt the same approach in sentencing while (as here) there is laughter in the air outside by certain characters on their way to the bank. Counsel for the applicant had submitted that as the accused was a first offender, the learned magistrate ought not have imposed a term of imprisonment. This may be quite so, in fact patterns of normal cases. Indeed, I couldn't have agreed more with this approach when, in *Goh Keng Seong v PP*, I had occasion to say:

> In short, there should be sufficient culpability on the part of the accused to justify imprisonment. This ought to be so as the court has to bear in mind that sending a motorist to prison, especially for a substantial term, would entail his having to commune and react with characters of an entirely different ken and may thus emerge from prison metamorphosed into a personality, the worse for society. Here, I am mindful of Professor TTB Koh's stimulating speech on a plea for penal reform which he delivered to the Kiwanis Club Singapore on 18 April 1972, wherein he expressed his concern about the probable 'corrupting influence of the inmate sub-culture', and which is reproduced in [1972] 1 MLJ lvii. This itself is inimical to public interest.

However, just as the contention that the provision for minimum mandatory imprisonment in a non-capital case is anathema to criminal jurisprudence, so also, we must be mindful that there is no law which precludes the magistrate, in a given peculiar set of circumstances, from imposing a term of imprisonment even for first-time offenders. Thus, when sentencing in certain exceptional cases, the court may factor into its deliberations on the question of public interest, not only patent but also latent circumstances that may operate for or against the accused person.

A Certainly, given the above fact matrix, even the appellant's counsel would concede that the learned magistrate had consciously carried out a carefully considered and calculated exercise of his discretion to mete out, what was to him, a condign penalty while constrained by the then prevailing circumstances, with the sole objective of deterring humdrum recurrence of such offences.

B Thus, this court is entirely satisfied that the sentence of the fine coupled with imprisonment imposed by the learned magistrate was not manifestly excessive under the circumstances of the case and he had adequately taken into consideration — certainly, mulled over — all the relevant factors necessary to maintain an equitable balance between prosecution and the C offender. Quite obviously, the prevalence-of-offence factor had indeed tipped the scales in favour of a custodial penalty. I therefore dismissed the appeal after applying the above guidelines to the present case.

However, confronted with the unfortunate fact disclosed in the appeal record that about 1,893 snakes had died while awaiting disposal resulting in undue hassle on the authorities (as pointed out by the learned deputy), and D considering that the maximum term of imprisonment allowed under the relevant sections is three years, I then called upon the defence to show cause why this court should not exercise its powers of revision under s 325 of the Criminal Procedure Code to enhance the term of imprisonment. And, after having heard counsel, I decided that as a forewarning to characters of the E appellant's ilk, this was a proper case to invoke s 325 to increase the respective seven days period of imprisonment to 14 days on each of the three charges, all to be served by the appellant concurrently. And it was so ordered.

Appeal dismissed; increasing the respective seven days period of imprisonment to F *14 days on each of the charges.*

Reported by Loo Lai Mee

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